



USING HUMAN RIGHTS TO PROTECT THE REPRODUCTIVE RIGHTS OF HIV-POSITIVE WOMEN IN THE UNITED STATES

Where Do These Norms Come From and How Can They Be Useful?

Human rights norms stem from several sources. Several are derived from treaties, also known as “conventions,” which the United States has either signed and ratified or has signed without ratifying. Under international law, the United States is bound to uphold obligations under the treaties it has ratified. Where the United States has signed but not ratified a treaty, it is obligated not to act contrary to the purpose of the treaty.¹ Another source of international law is “customary international law”—norms established by the customs of nations,² which may also be reflected in treaties, declarations, and other international agreements. Other documents, such as declarations, are non-binding but interpret binding treaty obligations or customary international law.

Under U.S. law, treaties and customary international law are binding, but do not necessarily give rise to a private right of action. The Constitution declares that treaties are the “supreme Law of the Land”³ and federal common law has accorded the same status to customary international law.⁴ However, it is difficult to bring private causes of action in U.S. courts under international law because under U.S. law ratification in itself does not create a private cause of action—Congress must do that separately (and rarely does). The United States also often ratifies treaties with “reservations” limiting their legal effect and ability to be enforced through private actions in courts.

Although these norms may not create a private right of action, public interest lawyers have successfully used international human rights treaties and documents interpreting international human rights law to inform judge’s decisions by framing domestic legal issues in a broader international context.⁵ Many courts have been receptive to domestic legal arguments that incorporate international human rights norm as a source of support. The Supreme Court has cited international human rights standards in finding unconstitutional laws prohibiting sodomy, laws allowing the imposition of the death penalty for juveniles and defendants with mental retardation, and in upholding affirmative action.⁶ Courts have also relied upon non-ratified treaties, customary international law, and the practice of other states in their decisions.⁷ International human rights norms may be particularly useful for framing issues in the context of international practice where a U.S.-based practice falls out of line with a general international consensus.⁸

¹ See Vienna Convention on the Law of Treaties, art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331, 336.

² U.N. Charter, art. 38, para. 1(b).

³ U.S. CONST., art. VI, cl. 2.

⁴ See Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. J (1987); see also Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 983-84 (2008).

⁵ See Cummings, *supra* note 4, at 985-87.

⁶ See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2001); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

⁷ For example, in *Roper v. Simmons*, the Supreme Court cited the Convention on the Rights of the Child (CRC), a treaty that the U.S. has not ratified but which is widely acknowledged as customary international law, in determining that the execution of minors is unconstitutional. 543 U.S. 551, 575-78 (2005). See also *Beharry v. Reno*, 183 F.Supp.2d 584, 600-01 (E.D.N.Y. 2002).

⁸ See Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int’l L. 1, 80 (2006).

International Human Rights Norms Supporting HIV-Positive Women’s Reproductive Rights

International human rights law supports the right of pregnant women living with HIV to choose and refuse treatment options to prevent vertical transmission. International human rights law protects the right to informed consent as part of the concept of physical integrity.⁹ This right is protected in numerous international human rights instruments, many of which are outlined below:

Protected Right	International Human Rights Instrument	Corresponding Obligations of the United States
The right to security of person	<ul style="list-style-type: none"> • Art. 3 of the Universal Declaration of Human Rights (“Universal Declaration”) • Art. 6 of the International Covenant on Civil and Political Rights (“ICCPR”) • Art. 6 on the Convention on the Rights of the Child (“CRC”) 	<ul style="list-style-type: none"> • The Universal Declaration is non-binding, but is considered customary international law. • The United States has signed and ratified the ICCPR, making it binding on the United States. • The United States has signed but not ratified the CRC, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention.
The right to liberty	<ul style="list-style-type: none"> • Art. 3 of the Universal Declaration • Art. 9 of the ICCPR 	See chart entry above.
The right to privacy	<ul style="list-style-type: none"> • Art. 17 of the ICCPR • Art. 16 of the CRC 	See chart entry above.
The right to the highest attainable standard of health	<ul style="list-style-type: none"> • Art. 12 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) 	<ul style="list-style-type: none"> • The United States has signed but not ratified the ICESCR, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention.
The right to non-discrimination, equal protection, and equality before the law	<ul style="list-style-type: none"> • Art. 3 and Art. 26 of the ICCPR • Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 	<ul style="list-style-type: none"> • See above. • The United States has signed but not ratified CEDAW, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention.

Guidance on the requirements of HIV testing and treatment under human rights law can be found in the UNAIDS International Guidelines on HIV/AIDS and Human Rights (“International Guidelines”).¹⁰ While the Guidelines themselves are not binding on the U.S., they are useful because they provide guidance and interpretation of the rights outlined in the chart above, which a court may find persuasive. They also demonstrate international practice, which courts often find persuasive.

Under Guideline 3 of the International Guidelines, public health legislation should ensure no one is subjected to coercive measures on the basis of their HIV status.¹¹ Guideline 8 requires states to promote a supportive and enabling environment for women . . . by addressing underlying prejudices and inequalities.¹² To this end, the International Guidelines require that states “ensure that all women and girls of child-bearing age have access to accurate and comprehensive information and counseling on the

⁹ See CENTER FOR REPRODUCTIVE RIGHTS, PREGNANT WOMEN LIVING WITH HIV/AIDS: PROTECTING HUMAN RIGHTS IN PROGRAMS TO PREVENT MOTHER-TO-CHILD TRANSMISSION OF HIV 5 (2005), available at [http://reproductiverights.org/en/document/pregnant-women-living-with-hiv-aids-protecting-human-rights-in-programs-to-prevent-mother-to-](http://reproductiverights.org/en/document/pregnant-women-living-with-hiv-aids-protecting-human-rights-in-programs-to-prevent-mother-to-child-transmission-of-hiv)

¹⁰ International Guidelines on HIV/AIDS and Human Rights, ¶ 119, U.N. Doc. HR/Pub/06/9 (2006). UNAIDS brings together ten organizations of the United Nations system: the United Nations High Commissioner for Refugees, the United Nations Children’s Fund, the United Nations World Food Programme, the United Nations Development Programme, the United Nations Population Fund, the United Nations Office on Drugs and Crime, the International Labour Organization, the United Nations Educational, Scientific, and Cultural Organization, the World Health Organization, and the World Bank.

¹¹ *Id.* at 27.

¹² *Id.* at 52.

prevention of HIV transmission and the risk of vertical transmission of HIV, as well as access to the available resources to minimize that risk, or to proceed with childbirth, *if they so choose*.”¹³ This statement supports women’s right to make informed choices about whether and how to use available resources to minimize risk of transmission.

With regard to specific international human rights, the International Guidelines interprets the international human rights framework to protect the right of HIV-positive women to determine their own reproductive health care. The rights of women to the highest attainable standard of health, to education, to freedom of expression, and to freely receive and impart information “includes the rights of women to have control over and to decide freely and responsibly, free of coercion, discrimination and violence, on matters relating to their sexuality, including sexual and reproductive health.”¹⁴ The International Guidelines warn against the discrimination inherent in “coercive measures directed towards the risk of transmitting HIV to the foetus,” and reiterates CEDAW’s mandate that states address all aspects of gender-based discrimination.¹⁵ The International Guidelines also state that coercive or punitive measures both violate human rights and fail to achieve public health goals because they deter those in need from seeking services.¹⁶ Clearly, coercive measures aimed at women will have a disparate negative impact on these women, which can in turn violate their right to be free from discrimination.

Women’s right to choose whether to pursue treatment to minimize the risk of transmission is also supported by the requirement of informed consent for HIV testing. Under Guideline 3 of the International Guidelines, public health legislation should also ensure that testing is only performed with the informed consent of the individual being tested.¹⁷ Specifically, the right to informed consent in testing is protected by the right to privacy,¹⁸ the right to liberty and security of person,¹⁹ and the right to the highest attainable standard of health.²⁰ As outlined in the chart above, these rights are derived from various international treaties, many of which are binding on the United States, and all of which obligate the United States, at a minimum not to act in a contrary manner. Coercive or mandatory treatment violates these rights for the same reasons as coercive or mandatory testing; it is invasive, often discriminatory, and compromises the ability of women to determine their own course of care.

Additional information is available on CHLP’s free, online Resource Bank at:

www.hivlawandpolicy.org

The Center for HIV Law and Policy

The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. Launched in 2005, CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV. We support and increase the advocacy power and HIV expertise of attorneys, community members, and service providers, and advance policy initiatives that are grounded in and uphold social justice, science, and the public health. We do this by providing high-quality legal and policy materials through an accessible web-based Resource Bank; cultivating an interdisciplinary support network of experts, activists, and professionals; and coordinating a strategic leadership hub to track and advance advocacy on critical HIV legal, health, and human rights issues.

¹³ *Id.* at 54 (emphasis added).

¹⁴ *Id.* at 85.

¹⁵ *Id.* at 87.

¹⁶ *Id.* at 78.

¹⁷ *Id.* at 27.

¹⁸ *See id.* at 91.

¹⁹ *See id.* at 95-96.

²⁰ *See id.* at 100.